

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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ON YOUR OWN LLC,

Plaintiff(s),

v.

MEREDITH CORPORATION, et al.,

Defendant(s).

Case No. 2:15-CV-289 JCM (CWH)

ORDER

Presently before the court is plaintiff On Your Own, LLC's (hereinafter "plaintiff") motion for summary judgment. (Doc. # 8). Defendants Eating Well, Inc. ("EW") and Meredith Corporation ("Meredith") (collectively "defendants")¹ filed a response, (doc. # 31), and plaintiff filed a reply, (doc. # 37).

Also before the court is defendants' motion to stay summary judgment briefing and argument. (Doc. # 16). Plaintiff filed a response, (doc. # 22), and defendants filed a reply, (doc. # 25).

Also before the court is defendants' motion to dismiss and, in the alternative, motion to transfer. (Doc. # 17). Plaintiff filed a response, (doc. # 23), and defendants filed a reply, (doc. # 26).

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¹ Plaintiff's complaint names three defendants: Meredith Corporation; Eating Well, Inc.; and Telemedia Eating Well, Inc. ("Telemedia"). (Doc. # 1). Plaintiff has not filed proof of service as to Telemedia, and Telemedia has not filed any responsive pleading or motion. The court will address the claims against defendant Telemedia below.

1 **I. Background**

2 This is a declaratory relief action stemming from a copyright dispute. Plaintiff is a Nevada
3 limited liability company with its principal place of business in Nevada. Kiley Hagerty
4 (“Hagerty”) resides in Colorado and acts as plaintiff’s sole managing member. Meredith is an
5 Iowa corporation with its principal place of business in Iowa. EW is an Iowa corporation with its
6 principal place of business in Shelburne, Vermont.² Meredith acquired EW in 2011. (Doc. # 1).

7 In 2012, Hagerty worked as an unpaid intern for EW in Vermont. After her internship,
8 Hagerty began creating a cookbook for publication. She reached out to EW’s editor-in-chief, Lisa
9 Gosselin (“Gosselin”), who expressed support and a willingness to help by reviewing the
10 cookbook. Gosselin represented that EW was not publishing books at that time and that it could
11 not allow recipes previously published by EW to be republished. (Doc. # 1).

12 On or about October 8, 2012, Hagerty met with Gosselin and showed her a draft of
13 Hagerty’s cookbook, contained in a binder. The cookbook included recipes and photographs taken
14 directly from EW’s online databases without change. The cookbook also depicted non-recipe
15 content, which plaintiff alleges was presented in Hagerty’s “own unique, expressive voice, without
16 containing any of [EW]’s creative expressions (if such expressions existed).” Gosselin expressed
17 enthusiasm about the work and offered to help Hagerty in her search for a publisher. (Doc. # 1).

18 Following the meeting, Hagerty followed up with Gosselin and other EW executives by
19 email, expressing her desire to work with EW to publish the cookbook. Hagerty also suggested
20 that EW could license her the recipes and photography at issue. EW representatives indicated that
21 they were circulating the work to potential sponsors and publishers, but did not always respond to
22 Hagerty’s inquiries and did not present her with any final licensing opportunity or option to
23 produce the cookbook with EW. (Doc. # 1).

24 Accordingly, Hagerty eventually revised her work “to ensure that any recipe previously
25 published by [EW] was either removed or altered in a manner as to no longer contain creative
26 expression from [EW].” In this process, Hagerty attempted to communicate with EW executives

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28 ² According to defendants, plaintiff misstates in its complaint that EW is incorporated in Delaware and headquartered in Charlotte, Vermont. (Doc. # 19).

1 regarding “what’s kosher and what’s not” with regard to the draft work, to ensure that her
2 cookbook was not “in conflict with anything in the [EW] world.” (Doc. # 1)..

3 On or about September 10, 2013, Hagerty retained an agent to assist her in acquiring a
4 publisher for her work. On or about January 2, 2014, Pelican Publishing Company, Inc.
5 (“Pelican”) agreed to publish Hagerty’s cookbook. On or about January 31, 2014, Hagerty emailed
6 certain EW executives informing them that she had secured a publisher. She invited the executives
7 to view her website and received positive feedback. (Doc. # 1).

8 On or about December 1, 2014, Pelican informed Hagerty that the work had an official
9 “on-sale date” of February 1, 2015. Accordingly, Hagerty retained an independent literary PR
10 agency to promote the release of her work. (Doc. # 1).

11 On or about January 19, 2015, the EW chief editor sent an email to Pelican alleging that
12 Hagerty had improperly copied EW’s content. The next day, Pelican contacted Hagerty’s agent
13 and forwarded the accusing email. On or about January 22, 2015, Hagerty’s agent forwarded
14 Pelican’s email and attached documents to her. Hagerty sought legal counsel and responded to the
15 email on January 30, 2015, proposing ways to amicably resolve the dispute. (Doc. # 1).

16 On February 3, 2015, defendants sent further correspondence accusing the work of
17 substantially infringing on four copyrights held by EW and Meredith. As a result, Pelican has
18 indefinitely postponed release of Hagerty’s cookbook, presales of the work were canceled, and
19 Hagerty was forced to cancel a number of appearances promoting the work. (Doc. # 1).

20 On February 18, 2015, plaintiff filed a complaint with this court seeking declaratory
21 judgments that EW’s material is non-copyrightable and that Hagerty’s work is non-infringing. The
22 parties then filed the instant motions.

23 **II. Legal Standard**

24 *i. Subject matter jurisdiction*

25 A court may dismiss a plaintiff’s complaint for lack of subject matter jurisdiction. Fed. R.
26 Civ. P. 12(b)(1). Federal Rule of Civil Procedure 12(b)(1) permits a party to assert this defense
27 by motion. *Id.* When presented as a factual challenge, a rule 12(b)(1) motion can be supported by
28 affidavits or other evidence outside of the pleadings. *Courthouse News Serv. v. Planet*, 750 F.3d

776, 780 (9th Cir. 2014) (citing *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989)).

“A plaintiff suing in federal court must show in his pleading, affirmatively and distinctly, the existence of whatever is essential to federal jurisdiction, and, if he does not do so, the court, on having the defect called to its attention or on discovering the same, must dismiss the case.” *Tosco Corp. v. Communities for a Better Env’t*, 236 F.3d 495, 499 (9th Cir. 2001).

ii. *Personal jurisdiction*

To avoid dismissal for lack of personal jurisdiction on the pleadings, a plaintiff bears the burden of demonstrating that his or her allegations would establish a *prima facie* case for personal jurisdiction. *See Boschetto v. Hansing*, 539 F.3d 1011, 1015 (9th Cir. 2008). A plaintiff must demonstrate jurisdiction over each defendant individually. *Sher v. Johnson*, 911 F.2d 1357, 1365 (9th Cir. 1990). However, allegations in the plaintiff’s complaint must be taken as true and considered in the plaintiff’s favor. *Rio Props., Inc. v. Rio Int’l Interlink*, 284 F.3d 1007, 1019 (9th Cir. 2002).

Nevada has authorized its courts to exercise jurisdiction over persons “on any basis not inconsistent with . . . the Constitution of the United States.” Nev. Rev. Stat. § 14.065. An assertion of personal jurisdiction must comport with due process. *See Wash. Shoe Co. v. A-Z Sporting Goods Inc.*, 704 F.3d 668, 672 (9th Cir. 2012). For specific jurisdiction, a plaintiff must demonstrate that each nonresident defendant has at least “minimum contacts” with the relevant forum. *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 801 (9th Cir. 2004).

The Ninth Circuit has established a three-prong test for analyzing an assertion of specific personal jurisdiction:

- (1) The non-resident defendant must purposefully direct his activities or consummate some transaction with the forum or resident thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws;
- (2) the claim must be one which arises out of or relates to the defendant's forum-related activities;
- and (3) the exercise of jurisdiction must comport with fair play and substantial justice, i.e., it must be reasonable.

1 *Id.* at 802. “The plaintiff bears the burden of satisfying the first two prongs of the test. If the
 2 plaintiff fails to satisfy either of these prongs, personal jurisdiction is not established in the forum
 3 state.” *Id.* (internal citations omitted).

4 “The purposeful availment prong of the minimum contacts test requires a qualitative
 5 evaluation of the defendant's contact with the forum state, in order to determine whether [the
 6 defendant's] conduct and connection with the forum State are such that [the defendant] should
 7 reasonably anticipate being haled into court there.” *Harris Rutsky & Co. Ins. Servs., Inc. v. Bell*
 8 *& Clements Ltd.*, 328 F.3d 1122, 1130 (9th Cir. 2003) (citations omitted) (internal quotation marks
 9 omitted).

10 *iii. Rule 4(m)*

11 Federal Rule of Civil Procedure 4(m) provides: “If a defendant is not served within 120
 12 days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—
 13 must dismiss the action without prejudice against that defendant or order that service be made
 14 within a specified time” Fed. R. Civ. P. 4(m).

15 **III. Discussion**

16 Defendants' motion to dismiss raises threshold jurisdictional issues. Accordingly, the
 17 court will address the motion to dismiss first, followed by the motions to stay briefing and for
 18 summary judgment.

19 *A. Motion to dismiss*

20 Defendants move to dismiss plaintiff's complaint on a number of grounds. The court will
 21 first address defendants' argument that the court lacks subject matter jurisdiction over the claims
 22 against Meredith. The court will then turn to the issue of personal jurisdiction as to EW.

23 *i. Subject matter jurisdiction over plaintiff's claims against Meredith*

24 Defendants contend that the court does not have subject matter jurisdiction over plaintiff's
 25 claims as to Meredith, because plaintiff lacks standing to request declaratory relief against
 26 Meredith.³ (Doc. # 17).

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 28 ³ “Because standing . . . pertain[s] to a federal court's subject-matter jurisdiction under Article III, [it is] properly raised in a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1)” *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000).

1 To maintain a declaratory judgment action, plaintiff must meet the case or controversy
 2 requirement of 28 U.S.C. § 2201(a). *See Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896
 3 F.2d 1542, 1555 (9th Cir. 1989). This requires plaintiff to have “a real and reasonable
 4 apprehension” that Meredith will subject it to liability. *See id.* at 1556. Defendants maintain that
 5 plaintiff cannot meet this standard because EW, not Meredith, owns the copyrights at issue.⁴ (Doc.
 6 # 17).

7 In its complaint and response to defendants’ motion to dismiss, plaintiff maintains that she
 8 has viable claims against Meredith based on a letter sent from defendants’ counsel to plaintiff’s
 9 counsel. Plaintiff and defendants attach copies of this letter to their briefing on the instant motion.
 10 (Docs. # 18, 23-5).

11 Defendants’ letter accused Hagerty’s work of “substantially infring[ing] on four works
 12 whose copyright is held in full or in part by [EW] and Meredith.” It also states that “Hagerty has
 13 infringed on [EW’s] copyrights,” and that “if Meredith and [EW] determine that legal action is
 14 necessary to protect their works from infringement (and/or to collect statutory damages for willful
 15 infringement), it [sic] will not hesitate to pursue that avenue.” (Doc. # 23-5).

16 Defendants now represent that regardless of what the letter says, EW, not Meredith, holds
 17 the copyrights to the content at issue. Defendants attach the affidavit of Wendy Ruopp, the
 18 managing editor of EW’s magazine. Ruopp attests that EW has published four cookbooks which
 19 reflect the copyrights at issue in this case. Ruopp states that EW holds the copyright to each of
 20 these cookbooks. (Doc. # 19).

21 The court may consider the parties’ affidavits and evidence in ruling on the instant issue.
 22 *See Courthouse News Serv. v. Planet*, 750 F.3d 776, 780 (9th Cir. 2014). Based on defendants’
 23 representations and the evidence presented by the parties, the court finds that plaintiff does not
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 28 ⁴ Section 501(b) of the Copyright Act provides that the owner of the copyright is the sole
 party permitted to sue for infringement. *See* 17 U.S.C. § 501(b).

1 have a “real and reasonable apprehension” of suit by Meredith.⁵ *See Hal Roach Studios*, 896 F.2d
2 at 1556.

3 Because plaintiff’s claims against Meredith are not suitable for declaratory relief, the court
4 will dismiss them. *See Fina Research S.A. v. Baroid Drilling Fluids, Inc.*, 98 F.3d 1357 (table),
5 1996 WL 521465, at *2 (Fed. Cir. 1996) (affirming dismissal on these grounds where defendant
6 “disclaimed the threat of suit” made in a prior letter from counsel, based on lack of legal interest
7 in patents at issue). Meredith is estopped from taking an inconsistent position or attempting to
8 enforce the copyrights at issue on a later date.

9 Because the court finds it appropriate to dismiss Meredith on these grounds, the court need
10 not address defendants’ Rule 12(b)(6) argument as to the sufficiency of plaintiff’s claims against
11 Meredith. The court will now turn to the issue of personal jurisdiction over EW.

12 *ii. Personal jurisdiction over EW*

13 Defendants argue that the court lacks personal jurisdiction over EW, such that dismissal is
14 necessary. (Doc. # 17). Plaintiff responds that the court has both general and specific jurisdiction
15 over EW based on circulation of its magazine in Nevada, access to its website in Nevada, and the
16 fact that EW sent a letter and email to plaintiff in Nevada accusing infringement. (Doc. # 23).

17 Plaintiff’s receipt of defendants’ cease-and-desist letters in Nevada is not sufficient to
18 subject EW to personal jurisdiction here. *Walden v. Fiore*, 134 S.Ct. 1115, 1125 (2014) (providing
19 that injury to a forum resident is not a sufficient connection to the forum); *see also Cascade Corp.*
20 *v. Hiab-Foco AB*, 619 F.2d 36, 38 (9th Cir. 1980) (rejecting argument that letters claiming patent
21 infringement sent to plaintiff in forum state and defendant’s advertisements in national
22 publications were sufficient to establish minimum contacts).

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26 ⁵ While not necessary to the instant ruling, the court will take judicial notice of the
27 copyrights referenced by number in defendants’ letter to plaintiff. The court may take judicial
28 notice of matters of public record. *See* Fed. R. Evid. 201(b)(2), (c)(1); *Intri-Plex Techs., Inc. v.*
Crest Grp., Inc., 499 F.3d 1048, 1052 (9th Cir. 2007). Meredith is not named on any of the
copyrights at issue. *See* United States Copyright Office, www.copyright.gov/records (last visited
August 5, 2015).

1 Moreover, passive websites do not automatically confer jurisdiction anywhere they are
2 viewable. *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 420 (9th Cir. 1997). In order to establish
3 jurisdiction based on a passive website, a plaintiff must show that a defendant’s website or related
4 activities directly targeted the forum through advertising or comparable affirmative conduct. *See*
5 *Rio Props., Inc. v. Rio Int’l Interlink*, 284 F.3d 1007, 1020 (9th Cir. 2002) (finding defendant’s
6 targeted marketing to Nevada residents was “something more” than operating a passive website).

7 EW’s website is passive. The website—as with any other publicly available website—is
8 viewable in Nevada. However, defendants do not advertise to Nevada residents specifically. *Cf.*
9 *Rio Props.*, 284 F.3d at 1020 (holding that defendant’s local radio and print advertisements in Las
10 Vegas, Nevada, were “something more” than operating a passive website).

11 Accordingly, the website does not satisfy the express aiming prong, and the court finds that
12 personal jurisdiction is lacking. *See Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1156-57 (9th Cir.
13 2006); *Rio Props.*, 284 F.3d at 1020.

14 EW’s only additional contacts with Nevada are that, as a publisher of a national magazine,
15 its magazines may be bought or sold in Nevada. This conduct does not subject EW to specific
16 personal jurisdiction, because the claims at issue here do not arise out of EW’s magazine
17 distribution. *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d at 802. Similarly, these contacts
18 are insufficient to establish general personal jurisdiction. *See Brody Enters v. MTS Partners, Inc.*,
19 No. 2:11-cv-00489-GMN-LRL, 2011 WL 2517029, at *2-3 (D. Nev. 2011) (holding that
20 nationwide solicitation of business is insufficient for general personal jurisdiction).

21 Plaintiff has failed to establish that EW expressly aimed its activities at Nevada, a
22 prerequisite for specific jurisdiction in this case. EW’s contacts with Nevada are nowhere near
23 sufficient to show that it was “essentially at home” here. *See Daimler AG v. Bauman*, 134 S.Ct.
24 746, 749 (2014) (explaining requirements for general jurisdiction).

25 Accordingly, the court will dismiss the claims against EW for lack of personal jurisdiction.
26 Plaintiff may bring its claims against EW in the appropriate forum.

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1 *B. Defendant Telemedia*

2 Plaintiff's complaint names a third defendant, Telemedia Eating Well, LLC ("Telemedia").
 3 On July 17, 2015, pursuant to Federal Rule of Civil Procedure 4(m), the clerk of court provided
 4 notice to plaintiff that the action would be dismissed as to Telemedia unless plaintiff filed proof
 5 of service on Telemedia before August 16, 2015. (Doc. # 38). Though the deadline has passed,
 6 plaintiff has failed to file proof of service as to Telemedia.

7 Accordingly, the court will dismiss defendant Telemedia and close the case.

8 *C. Motion to stay briefing*

9 Defendants filed a motion asking the court to stay summary judgment briefing and
 10 argument until the court rules on the motion to dismiss. (Doc. # 16). The parties have now fully
 11 briefed the summary judgment motion, and the court has found that dismissal of the action is
 12 proper. Accordingly, the court will deny the motion to stay briefing as moot.

13 *D. Motion for summary judgment*

14 Before serving defendants with its complaint, plaintiff filed a motion for summary
 15 judgment. (Doc. # 8). In light of the court's instant ruling on defendants' motion to dismiss and
 16 the court's dismissal of defendant Telemedia for failure to file proof of service, the court will deny
 17 the motion for summary judgment as moot.

18 **IV. Conclusion**

19 Accordingly,

20 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that plaintiff's motion for
 21 summary judgment, (doc. # 8), be, and the same hereby is, DENIED as moot.

22 IT IS FURTHER ORDERED that defendants' motion to stay summary judgment briefing
 23 and argument, (doc. # 16), be, and the same hereby is, DENIED as moot.

24 IT IS FURTHER ORDERED that defendants' motion to dismiss, (doc. # 17), be, and the
 25 same hereby is, GRANTED.

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1 IT IS FURTHER ORDERED that defendant Telemedia Eating Well, LLC, be, and the
2 same hereby is, DISMISSED without prejudice pursuant to Federal Rule of Civil Procedure 4(m).

3 The clerk shall close the case.

4 DATED August 19, 2015.

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UNITED STATES DISTRICT JUDGE